KELLEY DRYE & WARREN LLP

ORIGINAL

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

FACSIMILE (202) 955-9792

(202) 955-9600

DIRECT LINE (202) 955-9771

E-MAIL: apisciotta@kelleydrye.com

BRUSSELS, BELGIUM

PARSIPPANY, NJ

NEW YORK, NY

LOS ANGELES, CA

CHICAGO, IL STAMFORD, CT

HONG KONG

AFFILIATE OFFICES

BANGKOK, THAILAND

JAKARTA, INDONESIA

MANILA, THE PHILIPPINES

MUMBAI, INDIA

TOKYO, JAPAN

March 29, 2000

RECEIVED

MAR 2 9 2000

EX PARTE OR LATE FILED

PROBLEM COMMUNICATIONS COMUNICATIONS COMMUNICATIONS COMMUNICATIONS

Magalie Roman Salas Secretary Federal Communications Commission 445 12th Street, S.W., TW-A325 Washington, DC 20554

Re.

Ex Parte ET Docket 95-18; B Docket 99-81; RM-9328

Dear Ms. Salas:

The attached letter was delivered today, by hand delivery, to Chairman Kennard and Commissioners Ness, Tristani, Furchtgott-Roth and Powell. Copies were also delivered, by hand delivery, or first-class mail, to those on the attached service list.

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, an original and five copies of this letter are submitted to the Secretary for inclusion in the above-captioned proceedings.

Sincerely,

Aileen A. Pisciotta

Counsel to Final Analysis Inc.

No. of Copies rec'd_ List ABCDE

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE (202) 955-9792

STAMFORD, CT

PARSIPPANY, NJ

NEW YORK, NY

LOS ANGELES, CA

CHICAGO. IL

WRITERS' DIRECT LINES

(202) 955-9771 (202) 955-9606

BRUSSELS, BELGIUM

WRITERS' E-MAILS apisciotta@kelleydrye.com rsifers@kelleydrye.com

HONG KONG

March 29, 2000

AFFILIATE OFFICES BANGKOK, THAILAND JAKARTA, INDONESIA MANILA, THE PHILIPPINES MUMBAI, INDIA TOKYO, JAPAN

> Chairman William E. Kennard Commissioner Susan Ness Commissioner Gloria Tristani Commissioner Harold W. Furchtgott-Roth Commissioner Michael K. Powell Federal Communications Commission International Bureau 445 12th Street, S.W. Washington, DC 20554

> > Re: Ex Parte ET Docket 95-18; IB Docket 99-81; RM-9328

Dear Mr. Chairman and Commissioners:

Final Analysis Communications Services, Inc. ("Final Analysis") is licensed to operate a low-Earth orbit satellite system in the Non-Voice Non-Geostationary Mobile Satellite Service ("NVNG MSS") and has not previously participated in this proceeding. By its attorneys, Final Analysis is writing this letter at this time to express concerns about certain statements made to the Commission after the close of the pleading cycle in this proceeding by ICO Services Limited ("ICO") about developments in its strategy to deploy a mobile satellite service ("MSS") system in the 2 GHz band. Specifically, if accepted by the Commission, ICO's proposal would result in

See Ex Parte Letter dated March 2, 2000 from Cheryl A. Tritt, Counsel to ICO Global Communications to Magalie Roman Salas, Secretary of the FCC. The pleading cycle closed on February 17, 2000. Pursuant to §§ 1.415 and 1.1206 of the Commission's Rules, in the interest of a full and complete record, Final Analysis respectfully requests the Commission to include this letter in its ongoing consideration of the above-captioned

a fundamental shift in the conception of MSS service above 1 GHz as a primarily voice service to a primarily data service. This shift would have the effect of undoing the distinction that was created by the Commission when it developed separate rules for NVNG MSS, a service expressly defined by the Commission as a "mobile satellite service reserved for use by non-geostationary satellites in the provision of non-voice communications." If the Commission consents to the use of the 2 GHz MSS spectrum for primarily non-voice service, it would open competition between all MSS services operating across all MSS bands in a manner that could be significantly harmful to the existing NVNG MSS, or "Little LEO," licensees. These 2 GHz MSS systems, and perhaps other MSS systems above 1 GHz, could operate primarily data or data only systems in ample spectrum, providing a competition-crushing alternative to NVNG MSS systems, which the Commission has acknowledged need additional spectrum to meet current demands.

Discussion

ICO apparently has determined that to remain viable it must provide a new data service. This will require it to make a fundamental change to its system design to accommodate wider signals, lower error rates and higher data rates. ICO's proposal implicitly recasts its 2 GHz MSS system from one geared primarily to narrowband voice service (as described in ICO's Letter of Intent that is under consideration in the pending 2 GHz rulemaking proceedings), to one geared primarily to narrowband non-voice network data service. From that standpoint, what ICO is requesting is a fundamental change to the pending rulemaking proceedings, both in terms of the services and system designs authorized, and coordination rules that must be put into place. 4

proceedings. Copies of this letter have been submitted to the Secretary of the FCC in accordance with §1.1206(b)(1).

² See 47 C.F.R. § 2.1.

A recent Dow Jones article reports that "ICO will . . . announce its plan to recast itself not as an alternative to Iridium but as a rival to Teledesic. . . . ICO's scheme calls for \$60 million to be spent on modifications to its as yet unlaunched satellites to allow them to handle high bandwidth data traffic. ICO will then sell access to its network to companies keen to provide mobile data services." See The Register, October 29, 1999. Final Analysis does not believe there are any direct competitive issues between Teledesic and the NVNG MSS industry, because, among other things, Teledesic is a fixed satellite service. What makes this issue unique is that ICO is the first mobile satellite system to recast itself as a primarily data MSS system outside of the NVNG MSS bands.

The proposed change was brought to the Commission's attention by ICO because ICO expects that increased data rates will result in increased interference to terrestrial fixed service incumbents operating in the 2 GHz band. This, in turn, will require the relocation of substantially more terrestrial incumbents than originally estimated by the Commission. However, Final Analysis believes that the relocation issue is actually a subsidiary one to

The 2 GHz NPRM⁵ proposed to establish service rules for 2 GHz MSS derived from the service rules adopted for "Big LEO" MSS in bands above 1 GHz. Accordingly, there is no material difference between Big LEO MSS and 2 GHz MSS in terms of the authorized service offerings. Specifically, the rules were designed to foster the development of a narrowband, primarily voice service, designed to compete with terrestrial cellular and personal communications systems, and offer a viable alternative delivery system of both voice and data to underserved and rural areas.⁶ To be sure, Big LEO MSS and the parties filing applications or Letters of Intent in the instant 2 GHz MSS processing round always contemplated providing data as part of their service offerings. However, it was never contemplated that either Big LEO MSS or 2 GHz MSS would rely on data as the sole or primary service. It is clear from the Big LEO Report and Order that the focus of Big LEO MSS is on voice as the primary service offering,⁷ in contrast to the focus on non-voice (data) communications for NVNG MSS.

Regardless of the fact that all of the planned 2 GHz MSS systems have stated their intention to provide ancillary data services, ICO's proposal goes much further. ICO seems to indicate that it will still provide voice service but clearly it has determined that its original business plan to provide primarily voice service is no longer viable. The fact that ICO now views non-voice service as the key to its existence indicates that the company probably intends to completely abandon the voice market. Final Analysis is concerned that acceptance of ICO's proposal will open the door to a fundamental change in the very essence of all MSS above 1 GHz, virtually eliminating the service distinctions with NVNG MSS.

Final Analysis does not necessarily object to the assignment of MSS spectrum above 1 GHz, including in the 2 GHz band, to non-voice services. However, the Commission must ensure that any new policies concerning such assignments are substantively consistent with other

the main impact of ICO's proposal, which goes to the very heart of the MSS industry structure.

The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, IB Docket No. 99-81, Notice of Proposed Rulemaking, 14 FCC Rcd 4843 (1999) ("2 GHz NPRM").

See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, Report and Order, 9 FCC Rcd 5936, ¶3 (1994) ("Big LEO Report and Order"). See also, e.g., id. at ¶16 ("LEO technology . . . may enable residents of remote parts of Alaska to have individual telephone access for the first time").

See Big LEO Report and Order, 9 FCC Rcd 5936, ¶24 ("We indicated in the Notice that the public interest would be served if LEO systems provided efficient and ubiquitous voice service to users throughout the United States.")

existing policies and procedurally fair. At a minimum, they should do no harm to other licensed parties. Final Analysis is gravely concerned that, to the extent that ICO, as a narrowband mobile satellite service provider, intends to change its system design and service offering to provide primarily non-voice service, ICO effectively will become a NVNG MSS provider causing substantial competitive harm to NVNG MSS systems which have far less spectrum.

The nascent NVNG MSS industry has a critical need for additional spectrum, as the Commission has long recognized. The five licensed U.S. Little LEO companies still do not have sufficient spectrum to meet even current market demand. All of the spectrum allocated to NVNG MSS, which is an extremely small amount overall, is encumbered and timeshared. Most importantly, the Commission has formally acknowledged in its rules that Final Analysis, as the "System 2" NVNG MSS licensee, needs additional spectrum to implement its full system. In fact, in recognition of the deficiency of spectrum, the Commission took the extraordinary step of giving Final Analysis a first priority on future allocated NVNG MSS spectrum as needed to complete its system. Experience has shown that additional global allocations are extremely hard to come by for NVNG MSS. In this context, the opening up of other existing spectrum for direct competition in non-voice services by other MSS providers is highly prejudicial to NVNG MSS licensees.

Acceptance of ICO's proposal effectively would add another non-voice, non-geostationary MSS licensee, and perhaps more if others follow suit, competing for exactly the same market segments as the Little LEO licensees, with significantly more spectrum. The Commission should not accept ICO's proposal without obtaining further comments and establishing a record on the public interest impact of such a change because it is procedurally unfair to NVNG MSS licensees, especially because the issue has been raised only after the close of the pleading cycle. Moreover, in the event that the Commission determines that the 2 GHz band should be used for non-voice operations, existing licensees with need for additional spectrum should be given an opportunity to participate in this processing round. In particular, the Commission should consider whether the best use of 2 GHz spectrum for non-voice services is the fulfillment of its outstanding commitment to Final Analysis to assign future available non-voice spectrum to System 2 on a priority basis. 9

⁸ See 47 C.F.R. § 25.142(e).

Final Analysis can utilize 2 GHz frequencies for its NVNG MSS service without any significant change in its system design.

Conclusion

In sum, the Commission, in considering ICO's proposal, must take into account the broader impact on existing U.S. licensees. The Commission should not allow ICO's individual commercial needs to drive a substantial change in policy that has the potential to undermine existing U.S. licensees that have pioneered NVNG MSS and maintain global leadership in this new industry. Before it approves a wholesale give-away of spectrum for non-voice services to ICO, a foreign-licensed system in bankruptcy, the Commission should first accommodate U.S. non-voice licensees, such as Final Analysis, which have demonstrated their commitment to and capability for active implementation of a non-voice MSS system, ¹⁰ and whose significant need for additional spectrum has been officially acknowledged. At the very least, the Commission should not let ICO's special circumstances result in a *de facto* modification of the rules, absent a full and open proceeding that allows participation by affected parties.

Sincerely,

Aileen A. Pisciotta Randall W. Sifers

Counsel to Final Analysis Inc.

Districtle

cc: Attached Service List

demonstrated success.

10

by adopting polices that change the ground rules for companies which have not

Final Analysis has already spent tens of millions of dollars to design, construct and launch two experimental NVNG MSS satellites. In connection with its experimental satellite program, Final Analysis has already implemented ground systems capable of supporting its commercial constellation and has already developed prototype terminal devices. Additionally, Final Analysis has developed significant strategic and equity relationships with several major corporate partners, including General Dynamics Information Systems and Raytheon. In comparison, two of the 2 GHz applicants (Iridium LLC and Inmarsat Horizions) apparently have dropped out of the 2 GHz processing round and ICO is in bankruptcy. The Commission should first reward companies, such as Final Analysis, who have demonstrated a sustained commitment to implement commercially viable systems under existing rules, and not further undermine the process

CERTIFICATE OF SERVICE

I, Aileen A. Pisciotta, hereby certify that a true and correct copy of the foregoing Letter to Chairman William E. Kennard, Commissioners Harold W. Furchtgott-Roth, Susan Ness, Michael K. Powell and Gloria Tristani, on behalf of Final Analysis Communication Services, Inc., was delivered by hand or regular mail this 29th day of March 2000, to the individuals on the following list:

Mr. Donald Abelson*
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Thomas Tycz, Chief*
Satellite and RadioCommunications Div.
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Harold Ng, Chief*
Satellite Engineering Branch
Satellite and RadioCommunication Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Christopher J. Wright*
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Anna M. Gomez*
Deputy Chief, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Cassandra Thomas*
Deputy Chief, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Alex Roytblat*
Satellite and RadioCommunication Div.
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Dale Hatfield*
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Mr. Julius Knapp*
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Rebecca Dorch*
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Mr. Sean White*
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ms. Linda Haller*
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Mr. Fern Jarmulnek*
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Ari Fitzgerald*
Federal Communications Commission
Room 8-B201N
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Mark Schneider*
Federal Communications Commission
Room 8-B115
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Bryan Tramont*
Federal Communications Commission
Room 8-A302B
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Peter A. Tenhula*
Federal Communications Commission
Room 8-A204F
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Adam Krinsky*
Federal Communications Commission
Room 8-C302
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Howard Griboff*
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Christopher Murphy*
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Mr. Alex Royblat*
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Ms. Geraldine Matise*
Federal Communications Commission

445 12th Street, S.W. Washington, D.C. 20554

Mr. Karl Kensinger*
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Robert A. Mazer, Esq.
Vinson & Elkins
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1008
Counsel for Leo One Worldwide, Inc.
Counsel for Constellation
Communication Holding, Inc.

Leslie Taylor, Esq.
Leslie Taylor Associates, Inc.
6800 Carlynn Court
Bethesda, MD 20817-4302
Counsel for E-SAT, Inc.

Henry Goldberg, Esq.
Joseph Godles, Esq.
Mary Dent, Esq.
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C. 20036
Counsel for VITA

Mr. Steve Goodman
Halprin, Temple, Goodman & Maher
555 12th Street, N.W.
Suite 950 North
Washington, DC 20004
Counsel for ORBCOMM

Ms. Cheryl A. Tritt
Morrison & Foerster, L.L.P.
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, DC 20006-1888
Counsel to ICO Global Communication

Mr. Peter M. Connolly
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for TMI Communications and
Company, Limited Partnership

Mr. John C. Quale
Ms. Antoinette Cook Bush
Skadden, Arps, Slate, Meather & Flom, LLP
1440 New York Avenue, n.W.
Washinton, DC 20005-2111
Counsel for Celsat America, Inc.

Mr. Joseph P. Markoski
Mr. Herbert E. Marks
Mr. David A. Nall
Mr. Bruce A. Olcott
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, NW
Washington, DC 20044-0407
Counsel for The Boeing Company

Mr. William Wallace Crowell & Moring 1001 Pennsylvania Avenue, NW Washington, DC 20004-2505 Counsel for Globalstar, L.P.

Tom Davidson, Esq.
Phil Marchesiello, Esq.
Akin, Gum, Strauss, Hauer & Feld, LLP
1333 New Hampshire Avenue NW
Suite 400
Washington, DC 20036
Counsel for Mobile Communications
Holdings, Inc.

Kelly Cameron, Esq.
Robert L. Galbreath, Esq.
Powell Goldstein Frazer & Murphy LLP
1001 Pennsylvania Avenue NW
Sixth Floor
Washington, DC 20004
Counsel for Inmarsat Ltd.

Aileen A Pisciotta

^{*} Via Hand Delivery